United States Circuit Court of Appeals,

FOR THE SECOND CIRCUIT.

GEORGE L. WHITMAN,
Plaintiff in Error,
Defendant below,

AGAINST

NATIONAL BANK OF OXFORD,
Defendant in Error,
Plaintiff below.

BRIEF FOR DEFENDANT IN ERROR.

The National Bank of Oxford, the defendant in error and the plaintiff below, recovered the judgment now to be reviewed, against George L. Whitman, the plaintiff in error and the defendant below, for the sum of $4,205.48 upon a verdict by the jury rendered under direction of the Court, Hon. HOYT H. WHEELER presiding (fols. 55–57, 71–75). The direction was given upon the following state of facts :

Statement.

A corporation was duly formed in the year 1886, pursuant to the general laws of the State of Kansas, under the name of the Arkansas City Bank (83–102). Its purpose was a general banking and real estate business (87–88) and its offices were located in Arkansas City,

Cowley County, Kansas (88, 103). Its principal incorporator (90) was the defendant George L. Whitman, a resident of this district (Ans., 46). Mr. Whitman was one of the original directors (89), and has owned from the beginning $100,000 of its capital stock, or half the entire capital stock of the bank (98, 112-113; Ans., 49). For a time the bank was prosperous, as is evidenced by the fact that the defendant received a large amount of dividends (116). But in December, 1890, it suspended payments and made a general assignment for the benefit of its creditors (130–139, 170). From the time of its assignment it completely suspended its business.

About four months prior to its failure the bank endorsed and guaranteed for value and promised to pay two promissory notes (140–155) which were discounted with the plaintiff, a national bank located in Pennsylvania (81–82). It will be noticed that the endorsement was in the name of the Arkansas City Investment Company; but this is explained by the fact that in the year 1889 the name of the bank had been duly changed from the Arkansas City Bank to the Arkansas City Investment Company (119–129). The obligations of the corporation, evidenced by these two notes, were among its unpaid debts at the time of its assignment. The assignee made part payments upon them from time to time, but in 1895 (more than a year after the suspension) they were reduced to the form of a judgment in favor of the plaintiff and against the Arkansas City Investment Company, rendered in the District Court of Kansas, for the sum total of $3,468.30 (175–182). This judgment was rendered upon voluntary general appearance of the corporation, followed by the interposition of an answer. Thereafter an execution was duly issued out of the District Court upon the judgment against the corporation, directed to the Sheriff of Cowley County, and the same was returned wholly unsatisfied (168–170; 182–189). The Sheriff could not find any property whereon to levy the execution, having exercised all possible diligence in endeavoring to find property and

effects of the corporation whereon to levy, and having entirely exhausted the assets and property of the corporation (189). It appears, moreover, that nothing whatever remains in the hands of the assignee (156-168).

When this corporation was formed, the Constitution of the State of Kansas provided, and still provides, as follows:

Constitution, Article XII., Section 2:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

No "*other* means" have been "provided by law." But, for the enforcement of the double liability of stockholders enacted in the Constitution itself there have been special remedies provided by statute, the Legislature, however, at the same time, expressly leaving open to the creditor of a corporation the privilege of proceeding by ordinary action instead of availing himself of these special remedies. The first of these remedies is as follows:

General Statutes 1868, Ch. 23, Sec. 32; (General Statutes 1889, Sec. 1192):

> "If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder except upon an order of the Court in which the action, suit or other proceeding shall

have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly;"

And the Legislature, out of abundant caution, adds the following clause to this section of the statute:

"or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment."

The other remedy is special only in the sense that under the contingency there provided an action (of the ordinary form) may be brought without a preliminary judgment against the corporation. It is as follows:

Section 44 (G. S. 1889, Sec. 1204). "If any corporation, created under this or any general statute of this state, except railway or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and" (the balance of the section relates to a special remedy in favor of a stockholder who, having satisfied his liability, has brought an action for contribution against his brother stockholders).

Section 40 (G. S. 1889, Sec. 1200) gives a statutory definition of what is meant by the phrase "if any corporation be dissolved." It provides:

"Any * * * corporation shall be deemed to be dissolved for the purpose of enabling any creditors of such corporation to prosecute suits against the stockholders thereof to enforce their individual liability, if it be shown that such corporation has suspended business for more than one year."

From the foregoing statement of the facts it will be noticed: An execution has been issued against this corporation, and no property could be found whereon to levy the same, and it was returned unsatisfied; furthermore, the corporation has suspended business for more than a year, leaving various debts unpaid, including the debts on which the judgment in question against the corporation was recovered. It is admitted by the answer in this case that the defendant has not thus far been subjected to any liability as a stockholder of the corporation (Answer, 50). Such individual liability it is the purpose of this suit to enforce.

Our learned opponents have called the liability a statutory one. The appellation is, in our opinion, an entire misnomer. In one sense the liability may be called a constitutional one; but, in the truer sense, it is a contractual one. In other words, when Mr. Whitman made the contract by which he became a stockholder, one legal result thereof was this double liability flowing from the common law, as amended by the Constitution of the State of Kansas. No statute whatever, except the Constitution, was necessary for the support of this suit, as the legal rules in reference to a secondary liability are well settled and have been complied with in the bringing of this action. As, however, there were Kansas statutes, and in order that no unnecessary questions might arise, care was taken that in the commencement of this action no provision of those statutes should be contravened. "Execution has been issued against the corporation" and returned unsatisfied; the corporation "has suspended business for more than a year, leaving the debts in question unpaid." If, therefore, the statutes were intended to shape the liability stated in the Constitution, the plaintiff is within their terms. It does not seek, however, to avail itself of any statutory remedy; it seeks to avail itself of its contract rights as defined by the Constitution of the State of Kansas; and it comes before the Court with the conditions precedent satisfied which obtain in a suit against one secondarily liable, whether those conditions are defined by the common law or by the statutes of the State of Kansas.

POINTS.

I.

Any United States Circuit Court throughout the country, whether in or out of the territorial limits of the State of Kansas, which obtains proper jurisdiction of the parties, will entertain such an action as this.

On the argument below there was a tendency on the part of our learned opponents to confuse, or rather to intermingle, the various points of law that arose. May we, therefore, be excused in making this preliminary observation : This first point now to be discussed lies at the threshold of our right of action, and we admit the propriety of considering it at the outset. But we insist that if this point be decided in our favor, as was the result below, it should then be passed by absolutely, and that the suit should then be considered as if we were in the United States Circuit Court for the District of Kansas, or in the District Court of the State of Kansas. If the United States Circuit Court for the Southern District of New York has jurisdiction of the subject of this action at all, it must proceed to exercise that jurisdiction according to the constitution and statutes and decisions thereunder of the Kansas Courts.

(a)

It is settled law that *any* United States Circuit Court throughout the country, having the requisite jurisdiction by reason of diversity of citizenship and amount involved, and by reason of the residence of parties, and by reason of proper service of process, will entertain any actions except those of a criminal or of a *quasi* criminal nature or those in the nature of a pro-

ceeding *in rem.* Such actions only are confined to the locality where the crime is committed or the *res* is situated. The various refinements heretofore so much discussed, as to whether the liability sought to be enforced in a civil action was penal or tortious or contractual in its nature, have been entirely done away with by the recent case of

Huntington vs. Attrill, 146 U. S., 657.

In this case a judgment had been recovered in the State Court of New York against Attrill upon Attrill's liability as a director of a New York State corporation for the debts thereof on account of the filing of a false certificate, the plaintiff Huntington being a creditor of the corporation. Suit was brought upon this judgment in the State of Maryland. The highest Court of the State held that it could go behind the judgment to see the nature of the liability upon which it was recovered, and that upon so doing it appeared that the nature of this liability, both according to the decisions of the Courts of the State of New York and according to the decisions of the Courts of the State of Maryland, was highly penal. It therefore dismissed the bill. On writ of error in the United States Supreme Court to the Court of Appeals of the State of Maryland it was held, in the first place, that a Federal question was involved on account of the " full faith and credit " clause of the Constitution; in the second place, that the Maryland Court *did* have the right to look behind the judgment so as to see the nature of the liability; but, in the third place, that after so doing a liability was apparent, penal in its nature in one sense, but not penal in its nature in an international sense, *and therefore not a liability which could only be enforced in the State whose statutes had created it.* The present Court is doubtless familiar with this case, but we call attention to the following language in the opinion of the Court, rendered by Mr. Justice GRAY (p. 666).

" It will be necessary, in the first place, to consider the true scope and meaning of the funda-

mental maxim of international law, stated by Chief-Justice MARSHALL in the fewest possible words: 'The courts of no country execute the penal laws of another' (*The Antelope*, 10 Wheat. 66, 123). In interpreting this maxim, there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language.

"In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offence against its laws (*United States vs. Reisinger*, 128 U. S., 398, 402; *United States vs. Chouteau*, 102 U. S., 603, 611). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. * * *

"Penal laws, strictly and properly, are those imposing punishment for an offence committed against the State, and which, by the English and American constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. * * *

"The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual, according to the familiar classification of Blackstone: 'Wrongs are divisible into two sorts or species: *Private wrongs* and *public wrongs*. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals; and are thereupon frequently termed *civil injuries*; the latter are a breach and violation of public rights and duties, which affect the whole community, con-

sidered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemeanors*' (3 Bl. Com., 2). * * *

"The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this Court in *Dennick vs. Railroad Co.*, 103 U. S., 11. * * *

"The provision of the statute of New York now in question making the officers of a corporation who sign and record a false certificate of the amount of its capital stock liable for all its debts is in no sense a criminal or *quasi* criminal law. * * * As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the State, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign State or country. * * *

"The statute was not a penal law in the international sense."

It was therefore held that the Maryland Court should have given full faith and credit to the judgment recovered pursuant to that statute, and the case was remanded to the Maryland Courts for further proceed-

ings not inconsistent with the opinion of the Supreme Court.

The case of *Dennick vs. Railroad Co.*, 103 U. S., 11, which was the precursor of the *Attrill* case, is also directly in point. In this case it was held that the Courts of one State would enforce the liability incurred in any other State on account of the death of a human being in that other State occasioned by negligence and for which a right of action was given by the statute of that other State.

In *Northern Pacific Railroad vs. Babcock*, 154 U. S., 190, both of the above cases were cited and approved, and it was held expressly that all questions relating to the recovery were to be governed by the *lex loci*, and not by the *lex fori*.

Doubtless there will appear in the brief of the plaintiff in error a long argument on his contention that the Kansas statute is penal and that the nature of the liability is penal and not contractual. We differ with our learned opponents on this point ; but in view of the decisions above, the point is entirely immaterial. No one doubts that the liability of a director of a corporation for filing a false report is highly penal as the word is generally understood by the bench and bar. The liability arises from the misconduct of the director, and its extent is in no wise commensurate with the damage done to the creditor. It differs entirely in its nature from the liability sought to be enforced in this suit. But even such a liability can be enforced in the Federal Courts beyond the confines of the State in which it originated and in which the statute creating it was enacted. *A fortiori* can the stockholders' liability in the case at bar be enforced.

(b)

We have the support of judicial authority directly upon the point of enforcing this liability of the stockholders of a Kansas corporation outside the territorial limits of the State.

Rhodes vs. The United States National Bank, 66 Fed. Rep., 512, decided in 1895, by the Circuit Court of Appeals for the Seventh Circuit, was an action of the precise nature of the one at bar; namely, a suit in Illinois by a creditor of a Kansas corporation to charge a stockholder thereof with the double liability. The Court (p. 516) cites the Constitution and statutes and follows that by citations at length from various decisions of the Supreme Court of the State of Kansas. It holds that the United States Circuit Court for the Northern District of Illinois has jurisdiction over the subject of the action, and affirms the judgment below, holding the defendant liable as a stockholder.

We shall refer to this case again shortly in another connection. We would at present call to the attention of the Court the fact that this is the first decision by any United States Circuit Court of Appeals upon the very liability now sought to be enforced. It would seem that the decision should be followed in the other Circuit Courts of Appeals, for the simple reason that the question is now *stare decisis* in the Circuit Courts of Appeals throughout the country. If we understand the purpose of the Evarts Act, it was not to have a number of separate appellate courts whose decisions might differ without greater disrespect to each other than if a decision of the State Court of New York differed from a decision of the State Court of Illinis, but that there should be practically one Court, although from the necessities and extent of the country it was composed of different judges in different places. There can be no way of obtaining such a result except by following prior decisions of other Circuit Courts of Appeals.

Soon after the decision of the above case, the case of *McVickar vs. Jones*, 70 Fed. Rep, 754, was decided by Judge ALDRICH in the United States Circuit Court for the District of New Hampshire. This was a case of precisely the same nature as the one at bar. Judge ALDRICH held that an action would lie to enforce the liability in the Circuit Court for the District of New

Hampshire. We refer the Court to Judge ALDRICH's opinion for its admirable and lengthy citation of cases.

So, also, *Bank of North America vs. Rindge*, 57 Fed. Rep., 279, which was a case to enforce the same liability. It was held by Judge Ross in the Circuit Court for the District of California that the action would lie in that Circuit Court.

So, also, it has been held in the Supreme Court of the State of Missouri that the action would lie in the State Court of Missouri *(Guerney vs. Moore*, 131 Mo., 650*)*. The following observations of Judge GANTT are pertinent:

> "It does not follow that because the people of this Commonwealth have restricted the liability of stockholders in corporations created by virtue of our own laws to the amount of their stock that they will refuse to enforce in their Courts the contracts of its own citizens who voluntarily go into other States and become stockholders in corporations under their laws, which impose upon stockholders a present liability in excess of the amount of the stock taken. Such a contract is not against public policy; it contravenes no principle of good morals and has no mischievous tendency. It is not in any sense repugnant to our ideas of honesty or justice (pp. 673–674)."

So, also, in the Supreme Court of the State of California, that the action lies in the California state court.

Ferguson vs. Sherman, 47 Pac. Rep., 1023 (March, 1897).

The Court takes a very broad view of the liability, and holds that a stockholder in a street-railway corporation is *not* within the constitutional exception relating to "railway corporations."

If the Kansas decisions be pleaded, the action lies in a State Court in Massachusetts.

Hancock Bank vs. Ellis, 166 Mass., 414.

The liability has also been upheld in

Tuttle vs. The National Bank of the Republic, 48 Ill. Appellate Courts, 481.
Bank vs. Zinser, 55 Ill. Appellate Courts, 510.
Marshall vs. Sherman, 84 Hun, 186.

For instances of the enforcement of similar liabilities outside of the territorial limits of the State enacting the statute, see

Flash vs. Conn, 109 U. S., 371.
Cuykendall vs. Miles, 10 Fed. Rep., 342.
First National Bank vs. Gustin Co., 42 Minn., 329.
Paine vs. Stewart, 33 Conn., 516.
Aldrich vs. Anchor Co., 24 Oregon, 32.
Aultman's Appeal, 98 Pa. State, 505.
Ex parte Van Riper, 20 Wend., 614.
Savings Association vs. O'Brien, 3 N. Y. Sup., 764.

These Courts, to use the words of Judge LOWELL in the *Cuykendall* case above cited, "have not felt inclined to extend the illiberal and narrow rule of comity, or want of it, which stops all remedies at the line of the State. The venerable maxim that 'he who shares the benefit should share the burden' is just, and should not be local in its operation. It applies with full force to shareholders of a corporation."

There will be found in the opposing brief one or two cases to the contrary of the line of authorities which we have cited. They will be discussed at greater length in a more appropriate place in this brief. So far as their bearing upon the present point is concerned, the following observations of Judge GRAY in his opinion in *Huntington vs. Attrill* are most pertinent:

> "In this country the question of international law must be determined in the first instance by the Court, state or national, in which the suit is brought. If the suit is brought in a Circuit Court of the United States, it is one of those questions

of general jurisprudence which that Court must decide for itself *uncontrolled by local decisions.*"

Cited and approved on this point in *Bauserman vs. Blount*, 147 U. S., 647.

The present United States Circuit Court of Appeals is not bound by the case of *Marshall vs. Sherman*, 148 N. Y., 9; but rather is bound by the rules laid down in *Huntington vs. Attrill*, and by the decision of its sister Circuit Court of Appeals in *Rhodes vs. United States National Bank*. While Congress has been wise in limiting the jurisdiction of the Federal Courts over parties so as practically to require suits to be brought in the defendant's own home, the Supreme Court of the United States has with equal wisdom done away with the technical learning under which the State Courts have so often lent undue aid to their own citizens. The Circuit Court of the United States for the Southern District of New York has as undoubted jurisdiction of the subject of this action as the Circuit Court of the United States for the District of Kansas.

II.

The special remedies of the Kansas statutes do not and could not limit "the individual" double "liability of the stockholders" of a Kansas corporation, which liability "secures" the creditor.

We trust that we have shown in Point I. to the satisfaction of the Court that our cause of action will be enforced in the United States Circuit Court of New York whether the liability out of which it arose was penal or contractual. That being so, almost all of the cases cited by our opponents construing one statute to be penal and

another to be contractual, become immaterial. Almost every one of them which works out an opinion to the effect that a statute is penal concludes its decision upon the broad ground that a penal statute will not be enforced outside of the territory of the State in which it was enacted, because comity does not require it. In some few, however, there will be found a theory that a penal statute will not be enforced in any other State, not so much because comity does not require it, as because there is no *right*, as it were, involved in a penal statute, but merely a remedy. We could, of course, imagine a provision in a constitution or in an ordinary statute which, at the same time that it declared a right, expressly and in terms limited all proceedings to enforce that right to the courts of the State in which it was passed. We do not know of any such statute; there is no limitation of that nature in the constitutional provision of the State of Kansas; it would have have been clearly unconstitutional to have enacted any such provision in a statute of the State of Kansas; and the particular cases to which we allude do not deal with any such *express* limitation. The theory which we are about to criticise is literally that all that exists in a penal statute is the remedy, and (as a corollary) that one State cannot make mere remedies for another's courts.

As a matter of fact, as soon as we undertake to deal with this theory, the Court will see that in truth it too has been overruled by *Huntington vs. Attrill.* Perhaps the *Dennick* and *Babcock* cases show more accurately what we mean. It was there contended that the statutes giving executors or administrators the right to sue for damages for the death of a testator or intestate caused by negligence was a mere statutory remedy unenforcible elsewhere than in the State enacting the statute. It was argued that clearly the killing of the testator by negligence was not a breach of contract, and that the liability was not contractual. But the Court held that to be immaterial. There was a *right* of action involved in the statute, even if not a contractual one, and this right was capable of enforcement

anywhere. Every such case as *Marshall vs. Sherman* or *Lowry vs. Inman*, 46 N. Y., 119, or *Christensen vs. Eno*, 106 N. Y., 97, has been really overruled by *Huntington vs. Attrill*. To the old rule that no legal right exists without a remedy, the proper converse has been pointed out, that no remedies exist except for legal rights.

Yet in order to cover the ground completely, we shall address ourselves in this point to a discussion of the Kansas Constitution and statutes, and shall we think, be able to demonstrate anew that there was an express right given by the Constitution, and that the remedy for the enforcement of that right was not, and could not have been, confined by statute to the Kansas courts.

(a)

As a text for this discussion, it should be noted that a point in the brief has now been reached where we have one of the best settled rules of the United States Supreme Court for our support. As stated in one of its recent decisions, this rule is to the following effect:

> " This Court will adopt the construction of the statutes or constitution given by the Courts of the State, when that construction can be ascertained " *(Fairfield vs. County of Gallatin*, 100 U. S., 47*)*.
>
> This is a leading case upon this rule, and cites many of the earlier cases, giving quotations from their opinions. It holds that the United States Supreme Court will go so far as to change its construction of a statute, when the State Court has changed its construction of the same statute, and when no rights appear to have been acquired under the former decision.

The rule is nowhere better illustrated than in the case of

Flash vs. Conn, 109 U. S., 371.

This case came up from the U. S. Circuit Court for Florida, where it was sought to enforce a stockholders' liability under the statutes of the State of New York. The Supreme Court holds it to have been the duty of the Florida Circuit Court in construing that statute to follow the decisions upon that statute of the Courts of the State of New York. It is true that the case does not take the distinction afterwards taken in *Huntington vs. Attrill*, but seems to make the right of enforcement in Florida depend upon the question of whether the statute is penal or contractual in nature. To that extent it must be deemed overruled by *Huntington vs. Attrill*. But it still remains one of many authorities upon the general proposition in reference to the construction of State Constitutions and statutes by State Courts and the consequent duty of the Federal Court to follow such construction. It is particularly in point because it relates to a stockholder's liability, and the manner of and the prerequisites to its enforcement.

For the most recent case in the Supreme Court reiterating this rule, see

The California Irrigation cases, 164 U. S., 112.

In *Rhodes vs. United States National Bank* and *Bank of North America vs. Rindge* (cited *supra*), the rule was applied in the construction of this very Kansas Constitution and statute, and it was held that the Federal Courts were concluded by the Kansas decisions, and obliged thereby to enforce the liability.

Indeed, force and effect are given to the rule in the State Courts. For instance, in Massachusetts it had been decided in *Bank of North America vs. Rindge*, 154 Mass., 203, that construing the Kansas Constitution and statute according to the decisions of the State Court of Massachusetts, an action such as that in the case at bar would not lie. Thereupon, a suit was brought in which not only the statutes of Kansas were pleaded in the declaration, but also that as interpreted by the decisions of the Supreme Court of Kansas, the

liability of the defendant as a stockholder was a contractual liability, etc.

Hancock Bank vs. Ellis, 166 Mass., 414.

The Court says:

"The liability of the stockholders must be determined according to the law of Kansas. We now have a case where the declaration as we interpret it sets forth that according to the law of Kansas, the defendant is liable to a judgment creditor of the corporation as upon a contract which is suable anywhere. The facts alleged in this respect are different from those in any case heretofore presented to this Court (see *Bank of North America vs. Rindge*, 154 Mass., 203), and the alleged liability of the stockholders is of a different character from that which exists in this Commonwealth. We are, however, to adopt the construction which is given in Kansas to the liability and undertaking of stockholders in Kansas corporations, and to give force and effect to the same as there established. Accordingly, jurisdiction exists here to enforce the liability like other debts, if the law of Kansas is accurately stated in the declaration. On the demurrer we can only look at the averments of the declaration. We can not take judicial notice of the statutes of Kansas, or of their interpretation by the Courts of that state. At this stage, we simply look at the case as the plaintiff presents it.

"The fact that the corporation is in the hands of receivers is immaterial, because under the averments of the declaration the liability of the defendant is directly to the creditors, and the receivers could not enforce it (*Barre National Bank vs. Hingham Manuf. Co.*, 127 Mass., 563, 567, Cook, "Stock and Stockholders," Sec. 218, and cases there cited). The averments are sufficient to set forth that the defendant is such a stockholder

as by the law of Kansas would be liable to the plaintiff. Judgment reversed. Demurrer overruled."

So in *Marshall vs. Sherman*, 148 N. Y., 9, Judge O'BRIEN is careful to say that:

"The complaint contains no allegation as to the meaning or effect of these statutes or of the provision of the constitution quoted, under the adjudications of the Courts of Kansas. We are, therefore, obliged to construe them ourselves with the aid of such rules, and upon such principles as the Courts of this State apply in the construction of such enactments here."

It may yet be that when some pleader is fortunate enough to overcome all the technical objections that arise in the State Court when a suit of this nature is brought, even the Courts of the State of New York will be obliged to give effect to the Kansas Constitution.

In the Federal Court the technical requirements of pleading and proving the Constitution or statutes, and judicial interpretation thereof by the Courts of other States have been done away with from a very early date. The Court takes judicial notice of them.

Owings vs. Hull, 9 Peters, 607.
Hanley vs. Donohue, 116 U. S. 1, 6.
Mills vs. Green, 159 U. S., 651.

(**b**)

These decisions of the Supreme Court of the State of Kansas, are cited one after another in *Rhodes vs. United States National Bank*, quoted *supra*. They cover every point which can be raised in the case at bar, including the one now under discussion.

Before considering them in detail, we invite the attention of the Court for a moment to the language of the Constitution and of the statutes themselves. The Constitution says:

> "Dues from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder; and such other means as shall be provided by law; but such individual liabilities shall not apply to railway corporations, nor corporations for religious or charitable purposes."

Judge O'BRIEN, in *Marshall vs. Sherman*, states arbitrarily that this provision of the Constitution is not self-executing. But why not? "Dues from corporations shall be secured by individual" double "liability of the stockholders, and such *other* means as shall be provided by law."

Are we to rewrite the language of the Constitution so as to make it read that dues from corporations shall, *if the Legislature so enact*, be secured by individual double liability of the stockholders and such other means as the Legislature shall provide? *If we do that, we not only make the first provision merely tautological to the second, but take away any force whatever from either provision.* We must give the framers of the Constitution the credit of meaning to enact something. And if what they enact is in unambiguous language, why should we not give it reasonable effect? There can be but one reasonable construction of this provision of the Constitution: Corporate creditors shall, at any rate, have for their security double liability of the stockholders; if the Legislature desires to increase this security it has express constitutional permission. The Kansas provision is very different from the provision in the California Constitution, which secures creditors by *such* individual liability of the corporators and other means *as may be prescribed by law.*

It would prolong this brief to an interminable length and would give this particular topic undue importance if we went into an exhaustive discussion of all the clauses in constitutions of the various States which had or had not been held self-executing. In *Willis vs. Mabon*, 48 Minn., 140, it was held that the article of the Minnesota Constitution was self-execut-

ing which read as follows : " Each stockholder in any corporation * * * shall be liable to the amount of stock held or owned by him." This case was decided in 1892. The briefs of counsel on either side, which are given in the report, seem to be most exhaustive, and the opinion of Judge MITCHELL is full in the extreme. We ask the attention of the Court to this opinion. It distinguishes *Morley vs. Thayer* which has been relied upon by our opponents at bar, and criticises the old case of *Groves vs. Slaughter*, 15 Peters, 449. We have not been able to find any later case than *Groves vs. Slaughter* upon this point in the United States Supreme Court. A perusal of the arguments of Webster and Clay in that case, and of the prevailing and dissenting opinions, will convince the present Court that the Supreme Court at that time was more exercised upon the slavery question than it was in deciding correctly the construction of a provision in the Constitution of a State Court. This particular opinion was torn back and forth in the *Dred Scott* decision which shortly succeeded it.

See, also, *Peo. ex rel. McClelland vs. Roberts*, 148 N. Y., 360, where Judge O'BRIEN stated that the Civil Service provisions in the New York Constitution were self-executing.

Without extended discussion it certainly would seem that the provision in the Kansas Constitution is self-executing so far as the double liability of stockholders is concerned.

But however that may be—even if it was necessary to enact a statute for the enforcement of the right so declared—at any rate it was not necessary in such a statute to reiterate the declaration of the right. Our learned opponents on the argument below, having contended to their satisfaction that the clause in the constitution was not self-executing, proceeded then to treat the subject as if the Constitution had never existed; and, finding no express declaration of this right in the statute, they argued that *nowhere* was there any declaration of the individual liability of stockholders.

Therefore they said that there was nothing to the statute but a remedy. It needs only a glance at both of the statutes for the Court to realize that the Legislature enacted them mindful of the constitutional provision. The exceptions in both the statutes relating to railway, religious and charitable corporations are the same as those in the Constitution. Obviously the Legislature thought it unnecessary to say again what had already been said in the most powerful statute of the State.

What actuated the Legislature in supplementing the Constitution by statutes was undoubtedly a desire to provide summary remedies for the enforcement of the constitutional liability, at the same time expressly reserving the ordinary remedy by action. In creating these summary remedies the Legislature naturally formulated the conditions precedent to their use, and did so according to the general rules of law relating to stockholders' liabilities. These rules are tersely stated in Cook on "Stock and Stockholders," 3d Ed., Secs. 218, 219, where an abundance of authorities will be found. It can do no harm to reiterate these rules. We call particularly to the attention of the Court the fact that when once the liability is declared, nothing further is *necessary*, but merely *convenient* either in the line of summary remedies or in the line of a codification of the law relating to the enforcement of such liabilities.

> "SEC. 218. THE STATUTORY LIABILITY CAN BE ENFORCED BY CORPORATE CREDITORS ONLY.—The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation upon the insolvency assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the shareholders to the corporate creditors. Accordingly, a Re-

ceiver of an insolvent corporation, invested with 'all the estate, property and equitable interests' of the concern, has no power to enforce such a liability as this.

"SEC. 219. JUDGMENT AND EXECUTION MUST BE OBTAINED AGAINST THE CORPORATION BEFORE THE STOCKHOLDER'S STATUTORY LIABILITY CAN BE ENFORCED.—Even when not expressly provided by statute, it is the rule, according to the weight of authority, that corporate creditors, before they can proceed against the shareholders upon their statutory liability, must first exhaust their remedy against the corporation and its assets. This rule arises from the fact that the liability of the stockholders is not the usual fund for the payment of corporate debts, but that the corporate treasury is the primary resource."

"Frequently the statutes which impose this extraordinary or *extra* common-law liability upon shareholders provide that a creditor shall obtain judgment against the corporation, and that an execution duly levied thereunder shall have been returned wholly or partially unsatisfied before the creditor has a right to proceed against the stockholders individually. But, in general, proceedings against the corporation are not to be required when they would be nugatory or impossible."

The first of the two statutory provisions in Kansas is for the ordinary case of judgment obtained against the corporation, execution issued and returned unsatisfied. With those conditions precedent fulfilled, the creditor may at once issue a summary execution against stockholders of the corporation, or he may "proceed by action" in cases where it is not feasible to take such short proceeding. It will be noticed that the formulation of the conditions precedent to the issuance of an execution against the stockholder, or to procedure by action, result merely in a reiteration of the general rules, as

above stated. It, therefore, is unnecessary to debate whether the conditions precedent stated in the statute are obligatory to a procedure by action, because the same conditions precedent are obligatory to an action of this nature, even if not expressly so stated by statute. (The nature of the effect upon the stockholder of the judgment against the corporation will be the subject of special comment by us shortly, because it has been so much dwelt upon by the other side.) In the case at bar, we have obtained the judgment, execution has been issued and returned unsatisfied. We have, therefore, satisfied the conditions precedent of the statute, and have satisfied, as well, the conditions precedent as laid down in the general rules of law upon this subject.

The second statute provides for the peculiar contingency that occurs when the corporation has completely suspended business. In such a case it would be "nugatory or impossible" to require the entry of a judgment and the issuance and return of an execution (see observations of Judge WOOD in *Flash vs. Conn*, at p. 380). The statute therefore dispenses with this requirement, and provides that, when a corporation has suspended business for more than a year, action may be brought against the stockholders on the original debt and without joinder of the corporation. The only special *remedy* in this latter statute does not relate to the action against the stockholder, but relates to the action which the stockholder who has satisfied his liability may have on that account for contribution against his brother stockholders. He "may sue all who were stockholders at the time of dissolution for the recovery of the portion of such debt for which they were liable," and if he obtains judgment he may have a peculiar and flexible execution. Obviously there is nothing in the statute which would limit his right to sue for contribution elsewhere than in Kansas, the statute merely intending to enact that if he does sue for contribution in Kansas he may have this peculiar remedy by execution. What proceedings, however, he may take for contribution certainly can have no effect in limiting the right to proceed against him for the

original recovery. The very fact that contribution is contemplated shows that the Legislature had in mind an absolute liabil[illegible] on his part to the creditor. The burden is put upon the stockholder to seek contribution, and not upon the creditor by only permitting him to obtain from one stockholder his proportionate share. In the case at bar it will be noticed that we are within the conditions precedent stated in this statute for a suit against a stockholder. The corporation has suspended business for more than a year prior to the institution of this action, and we have proved the original obligations which were debts unpaid at the time of its suspension.

Unquestionably in neither of these two statutes did the Legislature have any intention of limiting the right declared in the Constitution, by granting exclusive remedies for its enforcement. Unquestionably, also, if the Legislature had had any such intention, it would have been unconstitutional. Any remedy which by its lack of efficiency substantially impairs a right given by a Constitution is for that reason unconstitutional. As an instance of this, the Court will bear in mind the well known rule that a Statute of Limitations so short as to hinder even the diligent, is unconstitutional. Our right against Mr. Whitman is practically gone unless we can enforce our remedies in the State of New York. The right was given us in the broadest terms in the Constitution, and no statute of the State of Kansas could have deprived us of it, even if such had been the object.

With these preliminary observations, we come to the consideration of the Kansas decisions, and find that the rules there laid down are the natural and sensible construction of the Constitution and statutes, and therefore merit consideration for their soundness as well as respect for their authority.

(c)

Howell vs. Manglesdorf, 33 Kan., 194. In this case the Court is construing Section 32 of the statute, and remarks as follows :

> " It will be observed that two remedies for enforcing the individual liability of stockholders are prescribed in the statute above quoted. In the one case, the judgment creditor of an insolvent corporation may proceed by a summary action on a motion in the Court where the judgment was rendered against the corporation ; in the other, by an ordinary action to be instituted wherever personal jurisdiction of the stockholders can be acquired."

It then shows why the summary proceeding by motion is only available where the notice is served within the State of Kansas, and concludes that :

> " This ruling does not deprive a creditor of the insolvent corporation of a remedy against the stockholder residing in another state, and upon whom service cannot be obtained here. While the liability is statutory, it is one which arises upon the contract of subscription to the capital stock of the corporation, and an action to enforce the same is transitory, and may be brought in any court of general jurisdiction in the State where personal service can be made upon the stockholder."

Our learned opponents made earnest contention in the Court below to the effect that the concluding observations of the Court in the above cited case were *dicta*. There are some *dicta* which are entirely *obiter*, and there are other *dicta* which are necessarily involved in the decision of the Court. The *dictum* above, if *dictum* at all, is of the latter nature. It was, to use the language of Judge WHEELER in his opinion below,

"so before the Court in construing the provisions of the Constitution and statutes together that it appears to have received full consideration."

See, also, *Hentig vs. James*, 22 Kan., 326, to the same effect.

Moreover, the general nature of the liability is construed in the *Howell* case. The Court expressly holds that "the liability to the creditors of the corporation is in the nature of a *guaranty*." This is amplified at great length in some later decisions of the Kansas Court.

Abbey vs. The Dry Goods Co., 44 Kansas, 415. The direct point decided by this case was that in enforcing the stockholders' liability, action *must* be against each particular stockholder, and that it was improper to join various stockholders. The case shows that the statute was merely an endeavor to formulate the ordinary rules of law relating to this class of actions.

(**d**)

A word about the judgment in Kansas against the corporation, as evidence against the stockholder to establish the debt of the corporation.

In *Glenn vs. Liggett*, 135 U. S., 533, it was held in reference to the effect of a judgment in Virginia under certain statutes of Virginia, that the rights of the parties must be adjudicated according to the requirements of the statutes and jurisprudence of Virginia, which State created the corporation, and in reference to whose laws the contracts of the subscribers to stock were made.

That case held, moreover, that the judgment in that case could only be reviewed or impeached collaterally for lack of jurisdiction or for fraud.

So in *Hawkins vs. Glenn*, 131 U. S., 319, it was said:

"A stockholder is bound by a decree of a Court of Equity against the corporation in enforcement

> of a corporate duty, although not a party as an individual, but only through representation by the company. A stockholder is so far an integral part of the corporation that in the view of the law he is privy to the proceedings touching the body of which he is a member."

The above citations state the general rule, and it is in no wise better reiterated than in the Kansas decision of *Grund vs. Tucker*, 5 Kans., 70. That case is the settled law of Kansas, and therefore the law to be applied in the case at bar. Some portions of the opinion are not material, because they do not apply to the present Kansas statute. The following are, however, in point :

> " The next important question is, is a judgment against a corporation *prima facie* evidence of the claim in an action against a stockholder? This has been decided both ways so often in New York that the law on that point must be considered in a state of uncertainty. In an early case it was held that the defendants were chargeable with the judgment, on the principle that the trustees, as the agents of the stockholders, had contracted the debt and fixed the liability, and that the stockholders could impeach the consideration of the indebtedness upon no other ground than that of fraud or error in the litigation; nor could this be done without laying the foundation for it in the pleadings. ' We must regard the judgment ' says Chief-Justice SPENCER, ' as a solemn admission of indebtedness, but it is not binding as a *res adjudicata* upon the stockholders if it was procured by fraud or founded in error ' (Slee vs. Bloom, 20 Johns., 669). And this, it seems to us, is sound doctrine that can be sustained on principle as well as by authority. A judgment against a corporation is of itself one of the ' highest evidences of indebted- known to the law ; ' it is a solemn admission of record that the corporation owes the amount for which judgment is rendered. * * *

"The judgment included interest on the judgment against the corporation. If the original judgment was evidence of an ascertained debt, the responsibility of the corporation, this was correctly done."

The comments of the learned Court as to the state of the authorities in the New York Courts is strictly true. But those latter authorities are none of them authorities in the case at bar, inasmuch as we must look to the Kansas Courts, and if we find nothing there, then to the United States Supreme Court.

The nature of the liability of the stockholder, consequent upon the entry of the judgment against the corporation, is also discussed in the Missouri case in which the Kansas stockholder's liability was enforced. *Guerney vs. Moore*, quoted *supra*. We refer the Court to the opinion in that case. It approves of the case of *Grund vs. Tucker*.

See also *Holland vs. Duluth Iron Co.*, 68 N. W. Rep., 50 (Supreme Court of Minnesota), which is a very well considered case, and holds to the same effect.

There is an obvious distinction between a case in which it is sought to prove by the corporate records, or by what the corporation has done, that a certain person *is* a stockholder in a corporation, and the case in which it is sought to fasten upon one who is unquestionably a stockholder in a corporation a liability for what that corporation has done or suffered done.

We have discussed this question of the effect of the Kansas judgment in order that we should not appear to overlook any point made by our adversaries. It is, however, wholly immaterial for the purposes of this case what view this Court may take as to the force or effect of the Kansas judgment. If the Kansas judgment conclusively establishes as against the stockholder the indebtedness of the corporation, then we have conclusively established it in this case as against this defendant. If the judgment is only *prima facie* evidence

as against the stockholder of the indebtedness of the corporation, then we have established the indebtedness *prima facie* as against the defendant; and, there being an absence of any evidence to the contrary, the *prima facie* case becomes conclusive. If the judgment be no evidence of the corporate indebtedness as against a stockholder, and if it be necessary to prove the indebtedness *de novo*, we have complied with this requirement, having established by independent evidence the indebtedness of the corporation, which is the basis of the liability sought to be enforced. So far as the obtaining of a judgment against the corporation may be a condition precedent to the bringing of an action against the stockholder, we have complied with this condition precedent by obtaining the judgment and putting it in evidence on the trial of this case.

In any view, therefore, of this question of law, we have established our cause of action against the defendant, either by the judgment or outside of the judgment. (We will discuss hereafter the technical point made, of the irregularity of the judgment as against the corporation.)

(e)

We distinctly take issue with our learned opponents in their attempts to distinguish the Kansas Constitution and statutes from the provisions of the National Banking Act and the provisions of the act of the State of New York. The wording of the Kansas Constitution is almost precisely the same as the declaration in the National Banking Act, that stockholders "shall be held individually responsible for all contracts," etc., "to the extent, etc." Almost the same words are used in the New York act, namely, "individually liable for all debts and contracts," etc.

The cases of *Richmond vs. Irons*, 121 U. S., 27, and *Wiles vs. Suydam*, 64 N. Y., 173, and the various other New York cases cited in *Flash vs. Conn*, are, in our

opinion, direct authorities in our favor upon this point. See also Morawetz, Sections 872–877.

The only distinction which to our mind rests upon any reason, is that between the liability (of a director) for misconduct, and the liability (of a stockholder) which springs into existence by means of his stockholding, and for that reason alone. If a director fails to perform the duties imposed upon him by law or under the statutes, then he may be visited with certain statutory penalties for his misconduct. This dereliction of duty on his part is tortious, and as his liability under the statute is often more than commensurate with the damage done to the creditors by his dereliction, his liability is in the nature of a penalty. But the stockholder is guilty of no misconduct. His liability is strictly contractual. Were there no corporation, he would be liable as a partner; that is, as one of the principals. There being a corporation, his liability is limited by the common law to the amount of stock held by him; but by the Constitution of Kansas this is again increased to a liability for double the amount of the stock held by him. These liabilities he takes upon himself by the contract of becoming a stockholder under which he contracts to share in the corporate assets and in the corporate profits, without subjecting himself to more than a limited liability for its losses. The common law is read into his agreement to become a stockholder, but no more and no less than is the Kansas Constitution read into his agreement to become a stockholder in a Kansas corporation.

In *Ferguson vs. Sherman* (cited *supra*) the Court discusses this particular point at length, and makes its decision depend upon it.

III.

The action was properly brought against one stockholder rather than several, and by suit at common law rather than in equity.

As the point of defect of parties was not taken by demurrer, and as the question now suggested was not discussed below, and as it is not now presented by any exception or assignment of error, we do not dwell upon it. Suffice to say:

Abbey vs. The Dry Goods Co., 44 Kan., 415, settles the rule in Kansas, and therefore the rule which should be followed elsewhere. See also Kansas general statutes, 1889, Section 4087, abolishing distinctions between suits at law and in equity, and Sections 1098 and 1101 prescribing that all joint liabilities shall be considered several as well.

The question is discussed at length in *Mc Vickar vs. Jones*, quoted *supra*, under the second, third and fourth grounds of demurer. Judge ALDRICH upholds the action in the form which we have adopted, and cites a large number of cases. Of these cases we particularly call to the attention of the Court the case of

Mills vs. Scott, 99 U. S., 25.
Flash vs. Conn, 109 U. S., 371, also treats of this precise question, and so does
Rhodes vs. U. S. National Bank, cited *supra*.
Swancoat vs. Remsen, 78 Fed. Rep., 592.

Finally, the case of *Auer vs. Lombard*, 72 Fed. Rep., 209, decided last year in the Circuit Court of Appeals for the First Circuit, lays down the general rule under all these statutes that the remedy is at law only and against each particular stockholder. We refer the Court to Judge PUTNAM'S opinion, which discusses all the cases. So

Weeks vs. Love, 50 N. Y., 568.
Ferguson vs. Sherman, cited *supra*.

The rule, certainly in the Federal Court, is settled beyond peradventure.

IV.

The Cases on Which the Plaintiff in Error Relies.

Marshall vs. Sherman, 148 N. Y., 9:

This case is not in point, because it refuses to take notice of or to follow the Kansas decisions. Apart from that, it is substantially in conflict with the doctrine of *Huntington vs. Attrill.* Again, it is contrary to the former decisions of the same Court, such as *Cochran vs. Wiechers*, 119 N. Y., 399, and other New York cases above cited, holding that a liability of this nature is contractual and not penal. Again, it is contrary to such a case as *Weeks vs. Love*, 50 N. Y., 568, and all the New York cases cited in *Flash vs. Conn*, on the point that the remedy is at law, and suit will lie against a single stockholder. This is substantially admitted in the decision:

> "It would perhaps be impossible to state the principle upon which the decision should rest without (apparently) coming in conflict with some of the numerous cases on the subject at some point" (p. 28).

To read the entire opinion of the Court is the best criticism upon it.

So far as *Lowry vs. Inman*, 46 N. Y., 119, and *Christensen vs. Eno*, 106 N. Y., 97, are concerned, it is easy to distinguish the nature of the statutes involved in those cases. Both of them lack the fundamental declaration of the right which is contained in the Kansas Constitution. In *Savings Society of St. Louis vs. O'Brien*, a case decided in 1889 by the General

Term of the Supreme Court, and reported in 3 N. Y. Supp., 764, statutes of this nature are sufficiently distinguished. The law, as stated in this latter case, would be applicable to the instance of the Kansas Constitution. And it was good law in the State Courts of New York until the decision of *Marshall vs. Sherman.* But the doctrine of all these cases is *contra* to *Huntington vs. Attrill.*

In reference to the decision of the State Court of Massachusetts in *Bank of North America vs. Rindge*, 154 Mass., 203, the Court only a year later, in *Hancock N. B. vs. Ellis*, cited *supra*, has prepared the way by which it will shortly entirely overrule its prior decision. This later case has already been referred to above.

The third State Court on which our opponents rely is that of Illinois. Surely this Federal Court will not consider the ruling of the Courts of that State when the Federal Circuit Court of Appeals, which has jurisdiction in that State, has directly passed upon this very question. Moreover, the decisions of the State Court have only illustrated the lengths to which some State Courts carry the policy of protecting their own citizens. In the first case in the Illinois State Court, the Appellate Court, which is equivalent to our Appellate Division, supported the right of a creditor to proceed outside the State of Kansas, (*Tuttle vs. National Bank of the Republic*, 48 Illinois Appelate Court Rep., 451). Shortly after that was decided, the Supreme Court of the State, in *Fowler vs. Lamson*, 146 Ill. 472, proceeded to hold that the Constitution of Kansas was self-executing, but that the two special remedies provided by the statute prevented the Constitution from executing itself outside the limits of the State of Kansas. The character of this decision was such as to cause the Appellate Division to pass it by in *Bank vs. Zinser*, 55 Ill., Appellate Court Rep., 510. Meanwhile the *Tuttle* case had gone to the Supreme Court, and a decision was first handed down which appeared in the "National Corporation Reporter" of Chicago, 20 December, 1894 (Vol. 9, p. 316),

distinguishing *Fowler vs. Lamson* on the ground that in that case the original judgment had been recovered in another State than Kansas, and affirming the decision of the Appellate Court (It is referred to in the opinion in *Bank vs. Zinser*). This decision was in some way rescinded, and eventually the Court, by a vote of four to three, held that the Constitution was *not* selfexecuting, and that therefore the liability would not be enforced (161 Ill., 497). The able dissenting opinion in that case has a valuable citation of cases. It is therefore apparent that most of the Judges in the State of Illinois before whom this question has come are of the opinion that the action will lie, and that the four Judges who have brought about the rule finally laid down in the *Tuttle* case have first changed their minds as to whether the action would lie, and then have changed their minds back again, the second time, however, giving different reasons than before their first change.

V.

Discussion of the Assignments of Error in Detail.

First, Second and Third:

These relate to the competency of our proof that the corporation changed its name. It is to be borne in mind that this testimony was not directed to the proof of any of the important contractual relationships on which our cause of action was founded ; but was merely of a fact explanatory in its nature; namely, to show why the corporation, originally having one name, had another name at the time when it endorsed the notes in question and at the time of its suspension. Viewing all the testimony on this subject (119-129), we do not think that, under the circumstances, any of the ques-

tions were incompetent on the ground that they called for secondary evidence without proper foundation. But, however that may be as to the preliminary questions, surely the offer in evidence of Exhibit 3, being a properly authenticated copy of the original certificate of change of name filed in the office of the Secretary of State of Kansas, was sufficient proof of the change of name. The filing of this certificate is the statutory method prescribed for a change of name. Corporation Act, Ch. 23, Laws of 1868, Sec. 11, provides that every corporation as such shall have the power to change its Corporate name. Section 12 provides:

> "Such change of name * * * shall take effect and be enforced from the date at which the president or secretary of the corporation shall file with the Secretary of State an affidavit setting forth the name adopted, * * * together with the date at which such change was voted by the stockholders of such corporation."

The certificate in question complies with this statute.

Fourth, Fifth and Sixth:

The proof of the original indebtedness was material and relevant; first, in order to satisfy the conditions precedent of the second statute under which, when a corporation had suspended business for more than a year, suit might be brought against stockholders without preliminary judgment against the corporation; and, secondly, to rebut any attack upon the judgment itself by showing that the judgment was the only one that properly could have been entered. If the Court decides that neither of these reasons is sufficient, its decision must be based upon the fact that the Kansas judgment was all the proof that was necessary. If so, the admission of this additional testimony was clearly harmless error.

Seventh:

So, too, the proof by plaintiff's Exhibit 7 (160-168), that no assets remained in the hands of the assignee,

was merely out of abundant caution. We agree that the return unsatisfied of the execution was, both under the general rules of law relating to this subject and under the statute, the only condition precedent necessary to the institution of this action.

See

Thompson on Liability of Stockholders, Sec. 320, and cases there cited.
Thornton vs. Lane, 11 Ga., 459, 514.
Barrick vs. Gifford, 47 Ohio St., 180.

The assignee had nothing to do with the matter.
Hancock National Bank vs. Ellis, 166 Mass., 414.

But, if out of abundant caution, we have committed error in bringing this immaterial testimony into the case, it in no way prejudiced the plaintiff in error.

Eighth and Ninth:

The reason for the offer in evidence of the Kansas judgment and of the execution thereunder and of its return, has been sufficiently discussed in Point II.

Tenth, Eleventh, Twelfth and Thirteenth:

These assignments of error involve the matters discussed by us in Points I. and II. The only matter that requires any further mention is one particular ground taken by the defendant on his motion to direct a verdict.

It appears that the suit in Kansas was begun by voluntary appearance of the corporation, and that such appearance was signed "The Arkansas City Investment Company, by J. L. Huey, Cashier and Managing Officer" (245). As appears by the judgment (178–183), an answer on the part of the corporation was interposed, the answer being filed by a *Kansas attorney at law*. (See stipulation, last page.) To this answer a reply was interposed by the plaintiff, and there seems to have been a regular trial by the Court. In other words, the judgment was

entered, not upon default in appearance or in pleading, but upon full appearance and pleading by one who is presumably an attorney at law and who presumably was duly authorized to represent the defendant in this case. Some point is made that, at the time of the service of the appearance, Huey was not the cashier; and the defendant, in support of the contention, points to Huey's testimony taken at the trial (102, 103). The reading of the testimony shows that Huey did not mean to testify to a resignation as cashier at the time when the corporation made an assignment, but merely to testify that he did not thereafter perform the ordinary duties of a cashier, as the corporation thereafter completely suspended its business. But if it be considered that this evidence did tend to show that Huey was not cashier at the time when the appearance was interposed, the appearance itself is some evidence to the contrary, and the defendant, therefore, should have asked to go to the jury upon that point (see *Fearing vs. Glenn*, 73 Fed. Rep., 116). Instead of that, both he and the plaintiff moved for a direction of a verdict, and thereby left to the Court the decision upon any dispute as to the testimony. But suppose Huey was not the cashier or managing officer, and bore absolutely no relation to the corporation. At any rate, an answer was interposed by one who purported to be an attorney at law, and who purported to represent the corporation in the suit. The corporation was still in existence for the purpose of suing and being sued.

See

Hawkins vs. Glenn, 131 U. S., 319.
Kansas General Statutes, Sec. 1200.
Also, numerous cases cited in Bliss N. Y. Code, 4th Ed., Vol. II., p. 2312.

It had not been dissolved in any other sense than in the sense that it had made an assignment and suspended business for more than a year prior to that date. It is true that the complaint alleges that the corporation was dissolved by a court of competent jurisdiction, but that allegation is put in issue by the answer, and the proof fails to show such dissolution. The state-

ment in the complaint was upon information and belief, and the affiant labored under a misapprehension in respect to that fact. The corporation never has been dissolved by any Court. This really appears affirmatively (160-169). The Kansas statutes, General Statutes, 1889, Sections 4146–4147, are substantially like those in the State of New York. They provide that a voluntary appearance or an answer shall be equivalent to service of summons, and they permit also a summons to be served upon a corporation by delivery to its cashier or managing agent.

Sifted down, the only question involved in this point is whether, in proving a judgment of a Court of a sister State, it is necessary affirmatively to prove the facts on which jurisdiction of the Court over the parties rested, or whether a presumption of fact is established by the entry of the judgment and the recitals therein. There can be but one answer to this question. The Court takes notice that the District Court of Kansas is a Court of general jurisdiction. It is perfectly well settled that where such a Court by the entry of the judgment has asserted jurisdiction, the burden rests upon those who deny it, whether the judgment be offered in evidence in a Court of the same State or in a Court of a sister State. It is true that, when the judgment is offered in evidence in a Court of a sister State, it is open to more kinds of collateral attacks than if it be offered in evidence in a Court of the same State. See, for instance,

Hall vs. Lanning, 91 U. S., 160.
Ferguson vs. Crawford, 70 N. Y., 253.

But the attack must be based upon some facts. *Hall vs. Lanning* was reversed because the defendant's offer of affirmative proof at the trial was rejected. He offered to prove affirmatively that the defendants in the original suit had been partners, but that, prior to the commencement of the suit, the partnership had been dissolved; furthermore, that the *only* authority for an appearance in his behalf was an authorization by his former partner, the other defendant. The well-settled rule of law was

then applied—that a former partner had no such authority, and that the appearance, therefore, would have been shown to be entirely unauthorized, and that, being offered in evidence in a foreign Court, the judgment could be attacked collaterally therefor. So, in the present case, if it had been *proved* that Mr. Atkinson was not an attorney at law, or that he had not received authority from the Board of Directors or from the proper officer of the corporation to interpose an answer, the judgment might be attacked collaterally. But there was a corporation for whom he interposed an answer. It had a Board of Directors; it had officers. There was some one who could have authorized that appearance and the interposition of that answer, and presumably the proper person did it. If Mr. Whitman did not like the Board of Directors, or did not like the officers, he owned half the stock, and had it in his power to change them. The following cases will suffice to sustain our position as above:

Tenney vs. Townsend, 9 Blatch., 274.
White vs. Crow, 17 Fed. Rep., 98.
Freeman on Judgments, 4th Ed., Secs. 124, 128, 565.
Pillsbury vs. Dugan, 9 Ohio St., 117.

And, after all, the judgment was not necessary.

Flash vs. Conn., 109 N. Y., 371.
Hardman vs. Sage, 124 N. Y., 25.

It is even expressly waived as a condition precedent in such a suit as the present, when the corporation has suspended business for more than twelve months.

VI.

The judgment should be affirmed.

William B. Hornblower,
Howard A. Taylor,
Of Counsel.